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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-683

THE WESTERN UNION TELEGRAPH COMPANY,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, AMERICAN TELEPHONE AND TELEGRAPH COMPANY, and the BELL SYSTEM OPERATING COMPANIES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The briefs in opposition filed by the Government and by respondents, American Telephone and Telegraph Company and the Bell System Operating Companies ("AT&T"), contain erroneous assertions and arguments which call for reply.

I.

AT&T's contention that Western Union seeks "a preferred position, vis-a-vis other carriers" (AT&T Opp. at

8) is unfounded.[1] Western Union seeks enforcement of contract rights it bargained for; it has never sought preferential treatment; it has never objected to other carriers' reliance on the Bell-Western Union contracts as a yardstick in securing comparable competitive rates. Assuming that the FCC's strained construction of the contracts was aimed at maintaining rate parity between Western Union and its competitors, neither the FCC, nor AT&T has ever explained why that goal cannot readily be achieved by requiring AT&T (a) to adhere to the contracts and (b) to extend the lower contract rates to Western Union's competitors during the contracts' life.

It is indeed true that competitive considerations are lurking here, but the question is not one of preferential treatment for Western Union vis-a-vis other carriers, as AT&T states. They derive, rather, from AT&T's attempt to impose on new common carrier competitors sharply higher rates than it was then charging Western Union for similar circuitry.

The Bell-Western Union contract rates were negotiated at arm's length in 1970 as a long-term commercial arrangement presumably satisfactory to both parties. At that time, AT&T could not foresee that the FCC would later adopt a policy of stimulating new competitive entry into private line communications. AT&T's attempt some three years later in 1973 to impose a new rate structure —ranging from 55 to 222 percent, and averaging 131 percent, above the contract rates[2]—reflected its growing awareness that the FCC would soon require it to furnish communications facilities to its small new rivals. It sought at first to abrogate,[3] and later to undermine, the

[1] The Solicitor General has not made this argument.

[2] *See* Bell Sys. Tariff Offerings, 46 F.C.C.2d 413, 434, *aff'd*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975).

[3] *Id.* at 430-31.

one available yardstick—the Bell-Western Union contracts—which the FCC might have applied to determine the charges to AT&T's new competitors. As AT&T was undoubtedly aware, the Commission might well find that the Bell-Western Union contract rates reflected a fair level of charges to all carriers, at least for the life of the contracts, because AT&T had voluntarily agreed to them at a time when its pricing judgment was unclouded by the intense animus it later developed towards its new competitors.

In short, regardless of the strictly legal questions involved in this litigation, there can be no doubt that (1) AT&T is opposed to the lower charges which the Bell-Western Union contracts provide, and (2) Western Union is not opposed to all carriers being permitted to lease facilities from AT&T at comparable, non-discriminatory charges.

II.

To avoid the controlling force of *SEC* v. *Chenery Corp.*, 318 U.S. 80 (1943), and *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U.S. 263 (1960), which the court below completely disregarded, AT&T argues that the agency decision was indeed the product of FCC expertise, although it concedes that "the FCC did not explicitly refer to or discuss the expertise which it could bring to the resolution of the Western Union-Bell System contract dispute." AT&T Opp. at 11 n.8. Reliance on expertise, however, is not a matter for *post hoc* speculation by counsel defending agency action; it must be determined by examining the agency's Memorandum Opinion and Order.

While recognizing that *Texas Gas Transmission* precludes a reviewing court from deferring to an agency's construction of a contract where the agency "treated the

question as one to be determined simply by the application of ordinary rules of contract construction" (363 U.S. at 268-69), the Government's brief in opposition asserts that the Court of Appeals correctly found that "the agency's specialized knowledge and regulatory responsibilities were implicated in its construction of the contract" (FCC Opp. at 7).

The Commission's opinion on its face clearly manifests the contrary. Therein the FCC explicitly states that its decision was based on "the language of the contracts." Pet. App. 54a. The facts were not in dispute, no evidentiary hearing was held or required, and no policy factors were articulated in the decision. In short, none of the traditional elements of agency "expertise" warranting judicial deference was present.[4] Pet. App. 54a-57a.

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[4] The cases relied upon by AT&T (AT&T Opp. at 9 n.6) are inapposite. They concern the resolution of factual disputes or the unequivocal exercise of agencies' expertise in making interpretations intimately concerned with their respective regulatory mandates. *See* United Gas Pipe Line Co. v. Memphis Light, Gas and Water Div., 358 U.S. 103, 114-15 & n.8 (1958) (deference due FPC determination whether contract falls within scope of an agency regulation); Gunther v. San Diego & A. E. Ry., 382 U.S. 257, 260-62 (1965) (deference due Railroad Adjustment Board as expert body in settling grievances growing out of the interpretation of collective bargaining agreements); NLRB v. Marcus Trucking Co., 286 F.2d 583 (2d Cir. 1961) (deference accorded NLRB finding that evidence manifests the *fact* that a contract had been agreed to); North Atl. Westbound Freight Ass'n v. FMC, 397 F.2d 683, 685 (D.C. Cir. 1968) (deference may be due FMC interpretation of shipping conference agreements when fact or policy issues are involved); St. Petersburg Bank & Trust Co. v. Boutin, 445 F.2d 1028, 1033 (5th Cir. 1971) (deference due SBA's construction of its own procedural requirement designed to carry out its statutory mandate).

AT&T also relies on Far East Conference v. United States, 342 U.S. 570 (1952), and Mississippi Power & Light Co. v. United Gas Pipe Line Co., 532 F.2d 412 (5th Cir. 1976). AT&T Opp. at 9-10 n.7. These cases, dealing with agency primary jurisdiction and not with judicial scope of review, are irrelevant. AT&T's argument

The only issue before the FCC and the only issue it addressed was the scope of the parties' contractual obligations.[5] The dispute was before the Commission not because of any complex technical questions or other factors requiring agency expertise, but solely because AT&T was attempting to apply to Western Union the Bell System tariffs that the FCC had already declared in an earlier proceeding to be a nullity insofar as the contracts and tariffs overlapped. *Bell System Tariff Offerings*, 46 F.C.C.2d 413, 434, *aff'd*, 503 F.2d 1250 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975). The issue before the FCC thus was merely the scope of the bargain—an issue the FCC itself recognized was controlled by settled principles of contract law (Pet. App. 56a)—and in that sense the question was identical to the one confronting the Federal Power Commission in *Texas Gas Transmission Corp.* v. *Shell Oil Co., supra.* While the FPC is surely as expert about natural gas transactions as the FCC is about communications carrier facilities arrangements, neither case involved anything more than ordinary contract construction.[6]

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obliterates the difference between agency jurisdiction and expertise entitled to deference by a reviewing court, treating them instead as coextensive. As shown in the petition for certiorari (Pet. 11-12), this error lies at the heart of the ruling below, and cannot be reconciled with *Texas Gas* and *Chenery*.

[5] In the second portion of the FCC's decision relating to the applicability of the contracts to domestic satellite operations, the Commission found it unnecessary to construe the contracts, and instead relied on the theory that Western Union had waived whatever rights it had. Pet. App. 58a-63a.

[6] The argument that agency expertise was implicitly involved in the contract adjudication, if at all applicable, is far more compelling in the case of the FPC's construction of the *Texas Gas* contract than the FCC's action below. Unlike the Bell-Western Union facilities contracts which are not subject to the FCC's ratemaking procedures (Pet. 4 & n.6), the natural gas contract involved in *Texas Gas* had previously been filed with the FPC as a rate schedule and had been subject to agency review under the Natural Gas Act. *See* Texas Gas Transmission Corp. v. Shell Oil Co., 363 U.S. 263,

Judge Garth's dissenting opinion below—the only judicial opinion to address the merits of the contract dispute—underscores the conventional common law character of the litigation. He was aware that no factual dispute existed (Pet. App. 33a) and that the FCC had found that there was no technical obstacle to using contract facilities for the switched services Western Union wished to provide. Pet. App. 35a, *quoting* Pet. App. 54a. The only issue was whether the contracting parties intended to freeze the types of services for which contract facilities could be used to those offered at the time the contracts were executed in 1970 or whether the parties drafted an agreement applicable to service offerings thereafter approved by the FCC as common carrier services. Pet. App. 36a, 56a. This type of question—do contracts apply under new conditions?—does not turn on technical expertise; the standards to be applied in resolving the question are those applied daily by judges in construing often complex commercial agreements.

Thus, Judge Garth's conclusion that the FCC had given the contracts a "tortured" construction in the mistaken belief that a literal construction would render the controlling provision superfluous (Pet. App. 35a-36a) was the product of ordinary contract analysis, well within "the conventional competence of the courts. . . ." *Nader* v. *Allegheny Airlines, Inc.*, 426 U.S. 290, 305 (1976). Like the FCC, he regarded this case as an ordinary contracts case. Indeed, not until the case reached this Court have respondents argued that it involved anything more. By treating the FCC action as something more, however, the majority below misconceived the nature of the

265 (1960). Since neither agency explicitly referred to its own expertise but simply referred to the law of contracts, the holding in *Texas Gas* that nothing more than principles of contract law was involved applies *a fortiori* to this case.

agency's decision and applied an improper standard of judicial review. In doing so, the Court of Appeals erroneously disregarded the patently applicable and controlling holding of this Court in *Texas Gas*.

CONCLUSION

The petition for certiorari should be granted and the judgment below reversed.

Respectfully submitted,

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